

**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION NO. 2002-160**

- ISSUES:**
1. What ethical constraints govern an attorney whose client has conferred upon her authority to settle, without instituting litigation, claims of the client for specific percentages of the amounts claimed, when the client has disappeared?
 2. What ethical constraints govern the attorney's right to collect legal fees from settlement proceeds when communication with the client is not possible?

- DIGEST:**
1. An attorney who has not been specifically authorized by a client to settle a claim has no implied or apparent authority to bind a client to any settlement. If the client has authorized the attorney to settle specific claims without instituting litigation, to receive the settlement proceeds, and to take a percentage of the recovery in payment of her fees, the attorney still has an ethical obligation to represent the client competently and to avoid reasonably foreseeable prejudice to the client. Depending on the circumstances, the attorney may have an obligation to make reasonable efforts to locate the client and communicate with the client before proceeding with the settlement. If the settlement offer falls outside the attorney's authorization, the attorney does not have a duty to file an action to avoid the running of the statute of limitations.
 2. If the settlement is permitted by the terms of the client's authorization, if the fee agreement is enforceable, and if the client's authorization to the attorney includes endorsing the client's name on checks paid in settlement of claims, then the proceeds must be placed in the attorney's client trust account and attorney's fees promptly withdrawn from the account.

AUTHORITIES

INTERPRETED: Rules 3-110, 3-500, 3-510, 3-700, 4-100, and 4-200 of the Rules of Professional Conduct of the State Bar of California.

Business and Professions Code sections 6068, subdivision (m) and 6104.

STATEMENT OF FACTS

An attorney ("Attorney A") is retained by a client ("Client") to collect outstanding medical claims. Attorney A's written retainer agreement with Client complies with the requirements of Business and Professions Code section 6147 and provides for Attorney A to receive as full payment for her services a contingency fee of 25 percent of each claim collected.^{1/} Client authorizes Attorney A in writing to accept on Client's behalf settlement offers of two-thirds or more of the amount sought in any claim, to receive the resulting settlement proceeds, to endorse Client's name to the settlement check, and to pay herself from such proceeds the agreed contingency fees for her legal services. Client also instructs Attorney A not to institute litigation on any claim without further specific authorization from Client. To avoid delay in effecting settlement on behalf of Client, Attorney A's check endorsement authority is contained in an acknowledged power of attorney from Client.

After retaining Attorney A, Client disappears. Attorney A then receives two offers of settlement of Client's claims: Attorney B offers to settle several claims for two-thirds of their face amount; and Attorney C offers to settle another

^{1/} All further references to sections are to sections of the Business and Professions Code.

group of Client's claims for one-half of their face amount.

DISCUSSION

The facts presented raise three questions:

- 1) Must Attorney A accept Attorney B's two-thirds offer on behalf of Client?
- 2) May Attorney A accept Attorney C's one-half offer on behalf of Client?
- 3) May Attorney A apply the proceeds from any settlement to her fees?

I. Must Attorney A Accept Attorney B's Two-thirds Offer on Behalf of Client?

In State Bar Formal Opinion Number 1989-111, this Committee addressed some of the ethical ramifications of representing clients who cannot be located. In that opinion, we pointed out that under agency law, an attorney has no authority to enter into settlements without the client's express consent. "[W]ithout the express consent of a client, an attorney cannot enter into a settlement agreement, [citations] endorse a client's name on a check, [citation] or dismiss a cause of action [citation]. It is clear the attorney is severely limited in the substantive acts the attorney may take on behalf of a client when the client cannot be located." (Cal. State Bar Formal Opn. No. 1989-111, at p. 1.)^{2/}

The Committee is now asked to opine on how the disappearance of a client, who previously has expressly conferred settlement authority on an attorney, may affect the attorney's ethical obligations when settlement offers have been made.

Although a client may specifically authorize the attorney to settle and compromise a claim, the attorney must bear in mind that she may not accept any proposed settlement which contains substantive terms at variance with the authority conferred on her by the client. (Blanton v. Womancare, Inc. (1985) 38 Cal.3d 396, 404 [212 Cal.Rptr. 151] [specific authorization required for settlement]; Alvarado Community Hospital v. Superior Court (1985) 173 Cal.App.3d 476, 480 [219 Cal.Rptr. 52] [attorney must be "specifically authorized" to settle a claim].) Attorneys have been disciplined for settling a client's case without the client's knowledge or consent. (Bambic v. State Bar (1985) 40 Cal.3d 314 [219 Cal.Rptr. 489]; Sampson v. State Bar (1974) 12 Cal.3d 70 [115 Cal.Rptr. 43]; Bodisco v. State Bar (1962) 58 Cal.2d 495 [24 Cal.Rptr. 835].) Hence, even if a settlement offer comes within an amount previously authorized by the client, installment terms, non-cash consideration, non-standard terms in a release, or other unanticipated conditions may render the settlement offer beyond the attorney's authority.

Moreover, even where a client's original authorization for settlement permits the attorney to accept every offer to settle a claim at or above the authorized level and the terms of the offer do not vary from those contained in the client's authorization, that authorization does not relieve the attorney from the obligations to act competently and not to prejudice the client. Even where there is no question about the attorney's authority to accept a settlement offer, the attorney's ethical obligations to the client require more of the attorney than merely accepting any settlement within the scope of the client's authorization.

Rule 3-110(A) of the Rules of Professional Conduct of the State Bar of California provides that an attorney "shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence."^{3/} Under rule 3-110(B),

^{2/} The Committee used the phrase "express consent" in the quoted passage. It appears from the context of the opinion, however, that the Committee meant "express authority." A missing client cannot be said to have given consent to an attorney's acts on behalf of a client, but the client could, in advance, have conferred upon the attorney the authority to act within a certain scope of conduct.

^{3/} All further references to rules are to the Rules of Professional Conduct of the State Bar of California.

“competence” means “to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.” Therefore, Attorney A should use her best judgment to determine whether she should try to obtain more than a two-thirds settlement, or whether she should simply accept the offer without further attempts at negotiation, because rejecting the offer, or delaying acceptance, might result in the offer being withdrawn entirely. Trying to negotiate a higher settlement might benefit Client beyond any increased recovery. Accepting without negotiation every offer that is at or above two-thirds of the claim might establish a reputation for Client among debtors of never negotiating and prejudice Client’s subsequent attempts to settle claims. The situation would be different, however, if a statute of limitations were soon to expire. Under these circumstances, Attorney A, with no authority to commence litigation, would not be in a position to try to negotiate a higher recovery for fear of the debtor withdrawing the offer entirely. (Cf. In the Matter of Aguiluz (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 32, 43 [attorney violated the predecessor of current rule 3-110 by intentionally disregarding a client’s instructions as to the settlement of case].)

In addition to her duty of competence under rule 3-110, Attorney A also has a duty under rule 3-500 and section 6068, subdivision (m) to inform Client of significant developments relating to the representation.^{4/} This means that Attorney A ordinarily must consider whether she should advise Client of changes in the law, business developments of which she becomes aware, information about the settlement practices of a defendant, or other information about the strength or collectability of a claim that might affect Client’s authorization to Attorney A.^{5/}

Finally, attorneys and clients have a fiduciary relationship “of the very highest character.” (Cal Pak Delivery, Inc. v. United Parcel Service, Inc. (1997) 52 Cal.App.4th 1, 11 [60 Cal.Rptr.2d 207].) This fiduciary relationship means the lawyer has a duty of undivided loyalty to his or her client. (*Ibid.*, citing Zador Corp. v. Kwan (1995) 31 Cal.App.4th 1285, 1293 [37 Cal.Rptr.2d 754].) “Perhaps the most fundamental quality of the attorney-client relationship is the absolute and complete fidelity owed by the attorney to his or her client.” (Cal. State Bar Formal Opn. No. 1984-83, at p. 2.) Thus, in all situations where Attorney A has discretion to accept or not accept settlement offers on behalf of Client, her desire to be paid from the settlement proceeds must not influence the exercise of that discretion.^{6/}

^{4/} Rule 3-500 provides: “A member shall keep a client reasonably informed about significant developments relating to the employment or representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed.”

Section 6068, subdivision (m) requires an attorney “[t]o respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.”

^{5/} Where the lawyer determines that the offer comes within her authorization, rule 3-510(A), which requires an attorney promptly to communicate to her client any written or significant offers of settlement, presents a different situation from that of rule 3-500 and section 6068, subdivision (m). The requirement to notify a client of significant settlement offers exists even where the client has pre-authorized the attorney to settle claims at or above a certain amount. Nevertheless, because the client’s disappearance makes it impossible for the lawyer to communicate with the client, the lawyer should exercise independent professional judgment on behalf of the client. If in exercising this judgment the lawyer concludes that no development takes the offer outside her original authorization, the lawyer should accept the offer even though she can not comply with the rule 3-510(A) communication requirement.

^{6/} “A lawyer should take care that a contingent fee agreement based upon the amount of property recovered does not affect the lawyer’s obligation of undivided fidelity to the client’s interests. For example, it is conceivable that a situation might arise wherein the lawyer’s personal pecuniary interest in achieving a high valuation of community property, thereby increasing the amount of his/her contingent fee, conflicts with the best interest of a client having a lower valuation.” (Cal. State Bar Formal Opn. No. 1983-72 at p. 4.)

The situation presented here, however, does not raise the same kind of “inherent” conflict of interest concerns raised in Ramirez v. Sturdevant (1994) 21 Cal.App.4th 904, 923-926 [26 Cal.Rptr.2d 554]. There, the court identified a

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State Bar Formal Opinion Number 1989-111 states that under rule 3-700, an attorney may withdraw if the client “renders it unreasonably difficult for the attorney to carry out the employment effectively” and that absence of the client may be a sufficient basis to withdraw. In a case where it reasonably appears to the attorney that she cannot carry out her instructions and fulfill her ethical obligations because of the client’s disappearance, the attorney would have an obligation to try to find the client or to withdraw in compliance with rule 3-700. Although there is no definitive standard governing efforts to locate missing clients, the attorney should consider the procedures discussed in State Bar Formal Opinion Number 1989-111, including retention of a private investigator or skip-tracing service, search of public records, use of registered or certified mail with return receipt or address correction requested, and telephone contact with the missing client’s relatives or colleagues. In addition, the attorney might utilize Internet resources in seeking a missing client. Further, in attempting to locate the missing client, the “attorney should not weigh the value of the client’s case or the attorney’s desire to withdraw from employment against the costs” of conducting a reasonably diligent search for the client. (Cal. State Bar Formal Opn. No. 1989-111, at p. 2.)

If the circumstances require Attorney A to bring additional information to Client’s attention so that Client can consider giving additional or different instructions to Attorney A, and if Attorney A cannot locate Client after reasonable efforts within the time available, then Attorney A may withdraw from her representation of Client only in compliance with rule 3-700. Rule 3-700(A)(2) permits an attorney to withdraw from employment only after she “has taken reasonable steps to *avoid reasonably foreseeable prejudice* to the rights of the client” (Emphasis added.). Although Attorney A’s duty to avoid such prejudice to Client A’s rights makes it unlikely that Attorney A could withdraw instead of accepting a settlement offer that complies with Client’s original authorization, that decision still would depend on all the existing circumstances.

Under our facts, Client has authorized Attorney A to settle claims at two-thirds or more of their face amount, but she has not *required* Attorney A to accept any offer at the two-thirds or more level. Nevertheless, even if the instructions were mandatory rather than permissive, this would not alter the fact the Attorney A is compelled to comply with the competence and disclosure requirements of rules 3-110 and 3-500 and section 6068, subdivision (m), as discussed above. If, for example, Attorney A were to obtain information suggesting that the two-thirds level might be lower than is in Client’s best interest, in the ordinary situation she would seek to bring that information to Client’s attention. Here, even though Client is missing, Attorney A should also seek to bring that information to Client’s attention to the extent that attempting to do so does not create other potential problems, such as might arise if the statute of limitations were about to run on a claim for which a two-thirds or greater offer has been received.

II. May Attorney A Accept Attorney C’s One-half Offer on Behalf of Client?

Under our facts, Attorney C has offered Attorney A only one-half of the face amount in a proposed settlement, less than the minimum of two-thirds authorized by Client. In light of the principles discussed above, Attorney A cannot accept any settlement offer at variance with her authority from Client. (*Silver v. State Bar* (1974) 13 Cal. 3d 134, 144 [117 Cal. Rptr. 82]; *Sampson v. State Bar*, *supra*, 12 Cal.3d at p. 82; *Alvarado Community Hospital v. Superior Court*, *supra*, 173 Cal. App. 3d at p. 480.)

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potential problem in the lawyer’s negotiating a settlement for the client, while at the same time negotiating the lawyer’s own separate fee claim. In such a situation where there was a single settlement fund out of which both lawyer and client would be paid, whatever advantage the lawyer were to gain on the lawyers’s own claim would necessarily be to the disadvantage of the client. In the facts presented here, there is no separate negotiation over the lawyer’s fee; it is set at the fixed amount of 25 percent of any claim’s settlement amount. Nevertheless, even though the concerns raised in *Ramirez v. Sturdevant*, *supra*, are not present here, in exercising the discretion Client authorized, Attorney A must not weigh her desire to be paid from the settlement proceeds and must instead defer to the client’s best interest.

Nevertheless, a problem could arise if the statute of limitations were drawing near. Because of Client's instructions not to file suit, rejecting the one-half offer would result in the loss of the claim altogether. Under these circumstances, it might appear that the duty of competence would require Attorney A to accept the one-half offer to save some recovery for Client. In our opinion, however, Attorney A would have no such duty. First, the client has not given Attorney A authority to accept a one-half offer. Second, the cases cited in the preceding paragraph demonstrate that Attorney A is not authorized to determine independently what is in Client's best interests from a substantive as opposed to a procedural standpoint. Attorney A cannot know all of the objective and subjective circumstances and considerations that govern Client's substantive decisions, and any decisions outside of Client's authorization therefore must be left to Client. If, for example, it were to become known that Client is accepting all settlement offers as the end of the limitations period draws near, other debtors might be encouraged to lower their offers, possibly even below one-half of the claim.

Another issue is whether the duty of competence would allow Attorney A to reject the one-half offer, but file a complaint to preserve Client's claim. In our opinion, that would not be a proper course of action for Attorney A. Although lawyers generally have authority to make tactical decisions during litigation, for example, calling a particular witness, they do not, merely by virtue of being retained by a client, have authority to file suit. (Blanton v. Womancare Inc., *supra*, 38 Cal.3d 396.) Filing a lawsuit without authorization violates section 6104, which provides that "[c]orruptly or wilfully and without authority appearing as attorney for a party to an action or proceeding constitutes a cause for disbarment or suspension." (See, e.g., In the Matter of Shinn (Review Dept. 1992) 2 Cal. St. Bar Ct. Rptr. 96, 104-105 [attorney's filing suit on behalf of himself and her client was a violation of section 6104 where attorney had not obtained client's consent]; In the Matter of Taylor (Review Dept. 1991) 1 Cal. St. Bar Ct. Rptr. 563, 575 [attorney's filing of a complaint without ever having discussed the complaint or the wording of the complaint with her client was a violation of section 6104].) Further, unlike the cases cited where the court found a violation of section 6104 even though the clients had not expressly prohibited the lawyers from filing suit, Client has expressly instructed Attorney A not to file a suit. Moreover, filing suit might be detrimental to Client and thus constitute a violation of Attorney A's duty of competence. For example, Client might have had reasons relating to finances, reputation, or other matters for instructing Attorney A not to file suit. Preserving the claim is only one of the considerations.^{7/}

III. May Attorney A Apply the Proceeds from Any Settlement to Her Fees?

A client can authorize an attorney to perform those ministerial acts necessary to conclude a settlement. (Palomo v. State Bar (1984) 36 Cal.3d 785, 794 [205 Cal.Rptr. 834] [client can expressly authorize attorney to endorse client's name to a settlement check]; Matter of Lazarus (Review Dept. 1991) 1 Cal. Bar Ct. Rptr. 387, 396-97 [permissible for a client to expressly authorize an attorney to sign a client's name on documents related to the client's case].) Here, the power of attorney Client executed expressly authorized Attorney A to endorse Client's name to the settlement checks. If a proposed settlement is in accord with Attorney A's authorization and the fee agreement giving lawyer 25 percent of each claim collected is enforceable,^{8/} then she may endorse and deposit the settlement check.

In collecting and accounting for the proceeds, Attorney A is governed by rule 4-100, which provides that an attorney must deposit in one or more client trust accounts all funds received or held for the benefit of a client. Rule 4-100(A)(2) goes on to require that any portion of that deposit that belongs to the attorney "must be withdrawn at the earliest

^{7/} Filing a lawsuit is one type of conduct that constitutes "appearing as attorney" within the meaning of section 6104. Merely drafting a complaint in anticipation that a lawsuit might be filed, however, does not constitute "appearing" under section 6104. (In the Matter of Lais (Review Dept. 1998) 3 Cal. St. Bar Ct. Rptr. 907, 916, ["Section 6104 does not prohibit legal services related to a possible appearance."] overruling In the Matter of Snyder (Review Dept. 1993) 2 Cal. St. Bar Ct. Rptr. 593.) Thus, preparing a complaint for filing in the event Client were found before the statute of limitations ran would not be a violation of section 6104.

^{8/} Whether the 25 percent contingency fee arrangement is enforceable would be determined by reference to rule 4-200, which provides a multi-factor balancing analysis to determine whether a fee is "illegal or unconscionable." This discussion assumes that the fee is enforceable.

reasonable time after the [attorney's] interest . . . becomes fixed." This Committee is aware of no case that has construed the meaning of "fixed." We conclude, however, that within in the very narrow circumstances of this situation—where the client has disappeared after having given the attorney the authority to perform the ministerial acts necessary to complete a settlement, including endorsing the client's name on the settlement check—the attorney's interest becomes fixed upon deposit.^{9/}

Attorney A accordingly must deposit into trust the proceeds of the settlement—which represent both Client's recovery on the claim and Attorney A's fee by virtue of the contingency fee arrangement—and promptly withdraw that portion of the settlement funds representing her fee. Attorney A must otherwise comply with rule 4-100 concerning the identification and preservation of client funds and client notification. In complying with the client notification requirements, the attorney should follow the procedures outlined above and in State Bar Formal Opinion Number 1989-111 for locating missing clients. (See also Cal. State Bar Formal Opn. No. 1975-36 [handling of abandoned client trust funds].)

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Governors, any persons or tribunals charged with regulatory responsibilities, or any member of the State Bar.

^{9/} The attorney, of course, must not withdraw any funds until the check has cleared.